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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 245

C. O. HANSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY

To United States Brief in Opposition to Petition For Writ of Certiorari

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The Brief of the Respondent filed in opposition to the Petitioner's Petition for a Writ of Certiorari is a remarkable document in one—the main—respect. Nowhere does it endeavor to support the indictments, that is, the filing of false and fraudulent individual returns for the years 1945 and 1946 and the corporate return or returns for the year 1945. It confines itself—as indeed it must—to facts that charge only false bookkeeping; and, studiously avoids an endeavor to establish the filing of false returns.

The crimes—if indeed any were committed—is the filing of false and fraudulent tax returns with intent to evade tax. The crime is such filing, whenever it takes place, and not the state of the books when entries are made or omitted. Book income is not necessarily taxable income, and the proof must be linked to a false tax return. That has not been done here. For example, the Government in its brief in opposition in the course of summarizing its proof after stating that the Petitioner had systematically diverted some $118,000. of corporate income to his own use, goes on to state (p. 7):

> "and that, while most of the $118,000. was reported as *corporate* income by manipulation of the closing inventory figures, some $47,000. was not."

Now, assuming arguendo, that $47,000. was not, but should have been, reported as income, although such is not a fact (see compilation on pages 18 and 19 of Petition) and was omitted due to "manipulation of the closing inventory figures", what evidence was adduced to establish beyond a reasonable doubt that such $47,000. did represent fraud and not error. The taxpayer met the issue—beginning with $46,851.62, the actual figure, (p. 18 of Petition) instead of the round figure of $47,000. What do we find? We find that the Government by Gov. Exhibit No. 71 establishes the fact, confirmed by the Petitioner, that the two Erie machines were his personal property and did not belong on the books or inventory; that another machine was in transit over the year-end and three had been sold on the installment basis; and that the petitioner in his own handwriting (Gov. Exh. 12f) (R. 121a) directed the inclusion of "M" invoices in inventory.

That is typical of the state of the record whereunder we contend the case should not have gone to the Jury. The Government's claim of $47,000. omitted from income and $118,000. diverted from income is specious and a far cry from proof beyond a reasonable doubt.

Where the Government admits, as it does in the above quotation, that all but $47,000. of the $118,000. was tax paid, and by its own Exhibits eliminates or casts doubts on the remaining $47,000., what grounds are there for submitting the case to the jury? It is safe to say that had the Government admitted to the Court and to the jury what it admits in the above quotation, that is, that "most" of the $118,000 was reported as corporate income, the trial Court would not have let the case go to the jury, and if it had, the jury would not have convicted.

Confining ourselves to meeting, in order, the statements made by the Government under the headings of "Statement" (p. 3) and "Argument" (p. 6) we submit:

The Government contends that the verdict is supported by the following evidence (Gov. Br. 3): the Kranz deal set forth on page 4 of the Government's brief; petitioner's denial of "M" invoices to the agents; failure of the recorded invoices to record the Kranz installment deal; and the list (Gov. Exh. 14) given to the agent supposedly by the petitioner. In view of the Inventory admission (p. 7) heretofore mentioned, we submit that these items are not proof of the filing of a fraudulent tax return—if they prove anything, it is proof of an attempt to *conceal* a fraudulent tax return; but *not the making* of a fraudulent tax return. They are two different crimes.

*The "falsity of the list * * * became more apparent."* (Gov. Exh. 14) (p. 5): So what! The crime charged is the filing of a false return with intent to evade tax—not the concealing of such crime.

"The proceeds of sales billed on "M" invoices were received by petitioner personally" (p. 5) and a long dissertation on the procedures involved, but omitting all reference to the fact that "most" (p. 7) of such items were inventoried. It asserts that the petitioner took the money out of the bank in cash, deposited it in his personal account, applied it to his personal loan; or placed it in his safe deposit box. So what! In view of the inventorying of most of the items, how does this prove the making of a false tax return?

The Government compares the income reported with the figure it alleges to be correct at the foot of page 5 and the top of page 6. Assuming the Government figures to be correct, what does that prove? A mere difference in amount is not conclusive of fraud—there must be more.

Next on page 6, the Government after admitting that the profit on cranes included in inventory (at sales price) resulted in no understatement of income, *declares that seven items were not so included; and constituted "the great bulk of the understatement of 1945 corporate income".* The understatement, with nothing more, is not proof of fraud; and it is fair to assume that if there were more, the Government would have directed attention to such evidence.

In the closing paragraphs of the "Statement" (p. 6) the Government states the petitioner took the stand; that he testified he had no intention of violating the revenue laws; that he instructed employees to keep

the "M" invoices and proceeds separate; and that he made restitution in 1954. We submit that not one of the facts set forth in this paragraph is proof of a fraudulent tax return; that it omits the inventory treatment of such sales; and that the Government evidence (Gov. Exh. 12-f) (R. 121a) sustains the petitioner's evidence of his instructions to inventory all such items as are now alleged to be the gravamen of a fraud.

We submit that the Government's "Statement" of the facts supports the petitioner's contention that there was no evidence to warrant submitting the case to the jury.

Addressing ourselves, now, to the Argument made by the Government, we direct the Court's attention to the following:

Re: Point No. 1 (p. 6). The Government contends that our position that the evidence was insufficient to sustain the verdict is without merit (p. 6) and in support of its position recites (p. 7) the following: that the petitioner diverted $118,000. of corporate income, although "most" was reported as corporate income; in which case, the fraud, if there was one, took place in the years the items were removed from inventory rather than in the years charged— if they were ever fraudulently removed; also that no priorities regulations were needed after September 30, 1945. The Government's expert witness on direct examination so testified; nevertheless, on cross-examination the witness acknowledged that ratings were in effect through April 1946 (R. 706a-707a); that only a new application for a rating was needed (R. 708a); and thus were still in effect in 1947 (R. 710a).

We submit that the Government has not "proved the falsity of petitioner's testimony" respecting priority regulations.

The Government in a footnote (p. 7 and 8) presumes to meet our argument on the absence of a depletion of the corporate pocketbook here as contrasted with such depletion in the cases of *Currier* v. *United States*, 166 F. 2d 346 (C.A. 1st) and *Davis* v. *United States*, 226 F. 2d 331 (C.A. 6th), certiorari denied, 300 U.S. 965, in order to preserve its treatment of a constructive dividend; and claims the "fallacy is patent", and the corporate assets "*were* depleted"; that the inclusion in closing inventory was false; that the machinery was gone and petitioner had pocketed the proceeds.

Let's test that statement, bearing in mind the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt. The items omitted from the closing inventory were the two Erie shovels respecting which the Government adduced Gov. Exh. 71 showing ownership in the petitioner—not the corporation; one shovel in transit (Dulaney); and three shovels sold on the installment basis (Kranz, H. London and M. London). Clearly there is grounds for the inclusion of such machines—excepting the two Erie machines that admittedly belonged to the petitioner personally—in inventory. The Government offered no evidence to show that title had passed to the purchaser on the machine in transit to Texas, and under normal business practice title would not have passed while the machine was in transit; there was no evidence that the three installment sales were not covered by a chattel mortgage or other fi-

nancial arrangement retaining title in the corporation until paid for.

We submit on Government's point 1 of the argument the Government has presented nothing to warrant the case going to the jury, or to sustain the jury's verdict.

Re: Point No. 2 (p. 8). Here the Government argues that the indictments were sound and valid. A reading of the Government argument confirms our contention that they were not. The Government contends that even though the reference to the tax returns as the "return" in the indictment is in the singular rather than the plural, the indictment by failing to characterize the term "tax" was "embracing all of the federal corporate taxes due for that year—income tax, declared value excess profits tax, and excess profits tax." Did it include all taxes? What about capital stock tax return and tax, social security returns and taxes; and, withholding tax returns and taxes? The Government's effort to extricate itself from the vagueness of the indictment only makes the vagueness more patent. The bill of particulars cannot expand the indictment—it cannot supply what is not there—it can only limit the proof within the scope of the indictment.

The conviction should be set aside because the concurrent running of the prison sentence does not cure the defect in the indictment or eliminate the separate fine.

Re: Point No. 3. In the third section of the argument the Government divides its argument into three parts, namely, (a) (b) and (c). We shall discuss each.

(a) The Government states what it considers to be the facts respecting *the enlargements*—not in evidence—of exhibits in evidence for limited purposes; but does not cite any authorities to support their use. As this Court said in *Holland* v. *United States*, 348 U.S. 121, 128:

> "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

and where, as here, they are allowed to remain in full view beyond the time the witness introducing them is on the stand, the jury is likely to give them an importance beyond the limits imposed by the Court. How can one conclude they did not influence the jury adversely?

The writ should be granted because of such prejudice.

(b) The Government attempts to support *the Court's refusal to admit in evidence Defendant's Exhibit SS for Identification* (R. 128a-138a) on three grounds; that it contained self-serving statements, that it was prepared in 1954, and that it was an agreement by the petitioner as an individual and the petitioner as 90% owner of the corporation.

The facts are, as stated in the exhibit, two attorneys negotiated the agreement based on an accountant's findings and the petitioner executed and carried out the agreement. The agreement goes to the very gravamen of the case—did or did not the petitioner hold such monies for the corporation? What the Appellate Court said respecting "M" invoices in its deci-

sion reversing the first trial (Petition App. p. 9) applies with equal force here:

> "Appellant was entitled to have such evidence submitted to the jury on the issue whether the money represented by such items, entered in the books as inventory at sales prices, was money belonging to the company which he was holding for it, or whether it was his own personal income."

We submit that the failure to accept such exhibit in evidence was reversible error.

(c) This point relates to *the rebuttal testimony* involving the Ritter Lumber Company purported sales. The Government's attempt to justify this evidence is whimsical. It states the evidence tended to rebut the petitioner's testimony that he received the proceeds of all "M" invoice sales, that he restored the funds, and now accounted for all such sales; and in a footnote belabors the defense for failing to ask for a continuance "in order to check the matter." Are we to believe that the Government intended to show by this testimony that the petitioner *did not* receive the proceeds of such sale? That he testified incorrectly when he told the jury "that he had received the proceeds from all the sales on "M" invoices"? Are we to believe that such testimony rebutted the petitioner's testimony that he restored the funds, when the Court excluded the detailed accounting of such sales—Pet. Exh. SS for Identification? Are we to believe that the defense was required to prove the petitioner did not receive the proceeds of sale of items not at issue as a crime and to ask for a continuance to prove such fact? Who had the burden of proof?

We believe the foregoing queries demonstrate the whimsical nature of the Government's argument and that the petitioner is entitled to a writ of certiorari and a reversal of the conviction.

Re: Point No. 4. Here the Government, in discussing the point we make claiming the *right of the defense to inspect certain documents*, instead of the Court doing so "in camera" on which point this Court ruled in *Jencks* v. *United States*, 353 U.S. 657 omits all reference to the *Jencks* case and contends the point has no merit. We submit *Jencks* v. *United States* (supra) is the law and cannot be cast off with the bare statement that an issue based thereon "has no merit". The sufficiency of the information furnished the defense is not the issue, the issue is as stated by this Court at page 672:

> "The burden is the Government's, not to be shifted to the trial judge, to decide * * * upon the possible disclosure of state secrets and other confidential information in the Government's possession."

The decision in the case at bar was rendered by the trial court before the Supreme Court spoke in *Jencks* v. *United States* (supra). The law was not changed until Congress acted on Public Law 85-265, 85th Congress, S. 2377, September 2, 1957, (71 Stat. 595) where it tempered the *Jencks* decision for future application. Nevertheless, at the trial in the case at bar, the law as pronounced by this Court in *Jencks* v. *United States* (supra) was the law; and a question based thereon does have merit.

We firmly believe certiorari should issue on this question.

Re: Point No. 5 Here the Government responds to our question respecting the conduct of the jury, juror No. 2, Mr. Strawn, and the Court's failure to grant our motion for interrogation of the jury. The Government does no more than classify the point as frivolous. Notwithstanding the characterization applied by the Government, it cites *Mattox* v. *United States*, 146 U.S. 140; which case, in fact, supports our position. There, this Court held that a matter resting in the personal consciousness of a single juror should not be received in derogation of the verdict; nevertheless, there was an exception in the interest of justice; and, quoting from Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey*, 12 Kansas 539, 545 said:

> "as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard."

We submit it was error for the trial court to fail to recall the jury for interrogation.

Conclusion: In concluding our Reply we direct attention to two questions raised by the Petition that the Government completely ignores in its brief.

Petitioner's question No. 7 which goes to the treatment of *a constructive dividend and its premise as a fraud charge* is mentioned by the Government only in a footnote on pages 7 and 8 of its brief; and there it confines itself to a discussion of the facts. It does not treat of the law at all, and we believe this Court should do so and set at rest that point.

Petitioner's question No. 12 relating to the binding effect of an offer of evidence. Throughout the trial the Government adduced evidence, oral and as exhibits that establish the lack of intent to defraud such as Gov. Exh. 71 (R. 123a) showing the ownership of the two Erie cranes to be in the petitioner's possession and not the corporation; and Gov. Exh. 12(f) (R. 121a) bearing the legend in the petitioner's handwriting "List in Inventory". Is not such evidence binding on the Government and does it not disprove an intent to defraud?

The Government, in its brief, has not come forth with any reason why the writ should not issue—it would have better acquiesced in petitioner's petition for a writ.

For the reasons stated herein and in the petition, the writ should issue.

Respectfully submitted,

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